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No. 87-1871

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FRANCIS MARION CAVE,
Petitioner,

v.

PITTSBURGH CORNING CORPORATION,
UNITED STATES GYPSUM COMPANY,
and NATIONAL GYPSUM COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether, in a diversity case, the issue of whether the plaintiff may settle with some defendants without waiving claims against others is governed by federal or state law.

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No. ———

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v.

PITTSBURGH CORNING CORPORATION,
UNITED STATES GYPSUM COMPANY,
and NATIONAL GYPSUM COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Francis Cave petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fourth Circuit directing the dismissal of his claims for personal injuries allegedly caused by respondents.[1]

OPINIONS BELOW

The opinion of the court of appeals is unreported and reprinted in Appendix A. The orders of the district court are unreported and reprinted in Appendices B and C.

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[1] In addition to the parties listed in the caption, the parties to this proceeding in the district court were Johns-Manville Corp., Johns-Manville Sales Corp., Owens-Corning Fiberglas Corp., the Celotex Corp., and Unarco Industries, Inc.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 8.01-35.1 provides:

> Effect of release or covenant not to sue in respect to liability and contribution.
>
> A. When a release or a covenant not to sue is given in good faith to one of two or more persons liable in tort for the same injury, or the same property damage or the same wrongful death:
>
> 1. It shall not discharge any of the other tort-feasors from liability for the injury, property damage or wrongful death unless its terms so provide; but any amount recovered against the other tort-feasors or any one of them shall be reduced by any amount stipulated by the covenant or the release, or in the amount of the consideration paid for it, whichever is the greater. A release or covenant not to sue given pursuant to this section shall not be admitted into evidence in the trial of the matter but shall be considered by the court in determining the amount for which judgment shall be entered; and
>
> 2. It shall discharge the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.
>
> B. A tort-feasor who enters into a release or covenant not to sue with a claimant is not entitled to recover by way of contribution from another tort-feasor whose liability for the injury, property damage or wrongful death is not extinguished by the release or covenant not to sue, nor in respect to any amount paid by the tort-feasor which is in excess of what was reasonable.
>
> C. A release or covenant not to sue given pursuant to this section shall be subject to the provisions of §§ 8.01-55 and 8.01-424.

D. This section shall apply to all such covenants not to sue executed on or after July 1, 1979, and to all releases executed on or after July 1, 1980, regardless of the date the causes of action affected thereby accrued.

STATEMENT

This is one of several hundred asbestos exposure cases now pending in the United States District Court for the Eastern District of Virginia. Petitioner, like the large majority of his fellow plaintiffs in these cases, agreed to settle his claims against some of the defendant companies. He did so at a time when both federal and Virginia law provided that such partial settlements did not affect the validity of claims against the remaining defendants. However the applicable Virginia statute was later held unconstitutional in state court to the extent that it covered causes of action arising prior to its passage. In such cases, therefore, Virginia reverted to the old common-law doctrine that release of one joint tortfeasor releases all. The issue presented here is whether the United States Court of Appeals for the Fourth Circuit was correct in applying this state-law principle to determine the impact of the settlements executed by petitioner in a diversity action pending in federal court.

This case merits further review for two reasons. First, the application of state law in this case is inconsistent with the governing principles of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny, because the federal courts have a paramount interest in controlling the terms on which parties in those courts may settle their disputes. Second, that paramount interest is implicated most tellingly here, where a federal district court, faced with a backlog of hundreds of asbestos cases, has actively encouraged partial settlements. After hundreds of such settlements were signed, the judicial revival of the Virginia common-law rule, combined with the Fourth

Circuit's decision to apply state law in federal court, now threatens, in the words of the district court, to "bring disaster upon the parties and this Court." Pet. App. 20a.

Petitioner, a Virginia resident, worked for twenty years in the construction industry. He was regularly exposed to asbestos in his work, and ultimately contracted the disease of asbestosis. In 1977, he filed suit in federal court based on diversity jurisdiction against eight asbestos manufacturers. In 1982 and 1983, petitioner settled his claims with two of the defendants—Owens-Corning Fiberglas Corporation and the Celotex Corporation—and the court entered orders dismissing the claims against these two parties. Pet. App. 11a. In 1985, the remaining defendants moved to dismiss petitioner's claims against them, invoking the common-law rule that the settlements with two defendants had the effect of releasing all others.

At the time of the two settlements, a Virginia statute—passed in 1979 and broadened in 1980 and 1982—had overturned this common-law rule by authorizing partial settlements with some but not all joint tortfeasors. *See* Va. Code § 8.01-35.1(A).[2] Moreover, the 1982 version of this statute, by its terms, applied to settlements executed after specified dates, regardless of the time when the cause of action arose. Thus, during this period, the Virginia rule applicable to the present case appeared

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[2] The common-law rule was first abrogated in 1979, when the legislature authorized partial settlements in the form of covenants not to sue. Va. Code § 8.01-35.1(A) (Cum. Supp. 1979). One year later, the abrogation was extended to releases. *Id.* (version effective July 1, 1980). Finally, two years later, the legislature provided expressly that the new rules would apply to "all such covenants not to sue executed on or after July 1, 1979 and to all releases executed on or after July 1, 1980, regardless of the date the causes of action affected thereby accrued." *Id.* § 8.01-35.1(D) (version effective April 1, 1982).

to be fully consonant with federal law, which has long authorized partial settlements.[3]

Respondents' motion to dismiss, however, was based on a 1985 ruling of the Virginia Supreme Court that the statute could apply only to causes of action arising after its passage. *See Potomac Hospital Corp. v. Dillon*, 229 Va. 355, 329 S.E.2d 41, *cert. denied*, 106 S. Ct. 352 (1985).[4] That court held that application of the statute in cases like this one—where the cause of action predated the statutory enactment but settlements were made afterwards—would be unconstitutional because it would deprive non-settling defendants of their common-law right to contribution from settling co-defendants, which, in the court's view, "arose" at the time of the original tort. 329 S.E.2d at 44-45.[5]

In 1985, the district court issued a consolidated ruling rejecting respondents' motion along with similar motions filed in two other asbestos cases.[6] Pet. App. B. The court held that the question of the impact of partial settlements on claims against other defendants should be determined, in diversity cases, under federal law. In so rul-

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[3] *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971); *Aro Manuf. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476 (1964).

[4] This ruling was based, in turn, on a 1984 decision of the same court construing the 1979 version of the statute as applying only prospectively, in light of the same constitutional concerns. *See Shiflet v. Eller*, 228 Va. 115, 319 S.E.2d 750 (1984).

[5] The common-law rule preventing partial releases had the effect of preserving every tortfeasor's right of contribution from other joint tortfeasors. In order to make partial settlements possible, the Virginia statute provides that such a settlement cuts off contribution claims against the settling tortfeasor, but any recovery against a non-settling tortfeasor is reduced by the amount of the settlement. Va. Code § 8.01-35.1(A).

[6] These other cases were *Mann v. H.K. Porter Co.*, Civ. Action No. 83-477-N, and *Mann v. United States*, Civ. Action No. 85-235-N.

ing, it relied on the Fourth Circuit's earlier decision in *Gamewell Manufacturing, Inc. v. HVAC Supply, Inc.*, 715 F.2d 112, 115-16 (1983). *See* Pet. App. 12a-15a. There, the court of appeals had stated that settlements in federal court "implicate federal procedural interests distinct from the underlying substantive interests of the parties," and that, even in diversity cases, the "standards by which that litigation may be settled . . . are preeminently a matter for resolution by federal common law principles, independently derived." 715 F.2d at 115.[7] Based on this ruling, the district court here went on to apply the usual federal rule that a plaintiff may settle with one joint tortfeasor without releasing another. Pet. App. 15a-16a. *See* note 3 *supra*.

The district court also included some discussion of the practical considerations at stake. It noted that there were pending in the district over 400 asbestos cases involving some 6000 defendants, that there had been partial settlements in over 70 percent of these cases, that these settlements had been "specifically encouraged by [the] Court," and that these settlements had "proved beneficial to both plaintiffs and defendants." Pet. App. 19a. The court expressed concern over the "obvious inequity" of dismissing cases in which there had been partial settlements since such a result would be "exactly contrary to all parties' intentions," Pet. App. 19a, and "decline[d] defendants' invitation to open the Pandora's Box which their arguments mask[ed]," Pet. App. 20a. In light of the importance of this ruling—which would affect "not only the instant cases, but virtually all pending and

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[7] *Gamewell* was not itself a diversity case, but the court's comments applied to all cases in federal court, "whatever [their] jurisdictional basis." *Id.* Moreover, while in *Gamewell* the actual issue was not the effect of a release on a non-settling defendant but rescission based on unilateral mistake, the court expressly rejected decisions applying state law to determine the former issue. *Id.* at 115 n.9.

future asbestos suits in Virginia." Pet. App. 9a, the district court simultaneously authorized an interlocutory appeal, Pet. App. 20a.

After respondents appealed, the Fourth Circuit ordered this case held in abeyance pending its ruling *en banc* in two other consolidated appeals raising similar issues. Pet. App. D. On October 6, 1987, the court of appeals ruled in these other cases that *Gamewell* was not controlling on the issue of what law applies to determine the effect of a settlement with one tortfeasor on claims against other tortfeasors. It held instead that, in diversity cases, this question involves the substantive rights of third parties and must therefore, under *Erie*, be decided on the basis of state law. *See Auer v. Kawasaki Motors Corp., U.S.A.*, 830 F.2d 535, 538 (4th Cir. 1987) (*en banc*), *cert. denied sub nom. Ebaugh v. Cessna Aircraft Co.*, 108 S. Ct. 1076 (1988). Judge Hall dissented, arguing that federal law should determine the effect of a settlement made in federal court, because a "federal court has a legitimate interest in controlling its docket and insuring fair dealing among the parties and between the parties and the court." 830 F.2d at 541.

Four months later, a panel of the Fourth Circuit held that the present case was controlled by the ruling in *Auer*, and reversed the district court. Pet App. A. Applying Virginia law, the court noted that the cause of action in this case arose before the passage of the statute abrogating the common-law rule on partial releases, and held that the common-law rule was therefore applicable.[8] Pet. App. 7a. Because petitioner had settled with two of the original eight defendants—albeit after passage of the statute authorizing such partial settlements and be-

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[8] In the consolidated cases, the court affirmed the district court on the ground that the injuries there did not occur until after the passage of the initial version of the Virginia statute. Pet. App. ——.

fore the decision in *Dillon* rejecting retroactive application of that statute—he was deemed to have forfeited all claims against any other joint tortfeasors.

REASONS FOR GRANTING THE WRIT

The ruling below merits review, first of all, because it is indefensible in principle. The Fourth Circuit, in this case and the earlier ruling in *Auer*, has skewed the balancing required by the *Erie* line of cases by giving precedence to wholly insignificant state interests at the expense of compelling federal interests in controlling the terms on which parties in federal court may resolve their disputes. Moreover, as the district court here made clear, the problems created by this erroneous approach are far from merely theoretical. In a multitude of pending cases involving pre-1979 injuries, that court is now faced with only two unpalatable choices. It can dismiss the remaining claims of plaintiffs who entered into partial settlements in good faith, or it can increase its backlog of pending asbestos claims by allowing those plaintiffs rescission of the partial settlements based on their justifiable misunderstanding of the law. This choice is rendered even more difficult by the fact that for any cases that do go forward—whether because there were no prior settlements or because settlements are rescinded—the possibility of reducing litigated claims through partial settlements is no longer available. For these reasons, we ask that the Court accept this case for plenary review or, at minimum, hold this petition pending the rulings in two other *Erie* cases argued this Term.

I. The Fourth Circuit's Approach Conflicts with the Governing Precedents of this Court.

The outcome below cannot be squared with the standards for handling *Erie* problems set out by this Court in *Byrd v. Blue Ridge Electric Cooperative*, 356 U.S. 525 (1958), and *Hanna v. Plumer*, 380 U.S. 460 (1956). The

Fourth Circuit has said, in effect, that where any legal issue arising in a diversity case potentially affects the enforcement of a state-law right—such as respondents' right of contribution in this case—then the determination of that issue automatically must be made under state law. Such an approach begs the key question under *Byrd* and *Hanna*. Although those two decisions differ to a degree in their analytic approach, each mandates an appropriate *balancing* of factors to determine whether the state's interest in complete uniformity between cases in state and federal court outweighs any federal interest in applying federal law to decide a given issue.

A. The Byrd Approach

The *Byrd* analysis proceeds in two steps.[9] First the court must determine whether the state rule at issue is "bound up" with the underlying state-law cause of action "in such a way that its application in the federal court is required." 356 U.S. at 535. If so, then state law must be applied. If not, then the rule constitutes a rule of "form and mode" and, if it is likely to have an effect on the outcome, the court must proceed to balance the state interest in uniform outcomes against any federal interest that may exist in following different procedures in federal court. *Id.* at 536-39.

Applying this analysis, the Court in *Byrd* first held that the rule at issue—*i.e.*, whether a judge or jury should determine the plaintiff's status as an "employee" of the defendant barred from proceeding outside the state workers compensation scheme—was not an "integral part" of the state compensation system but a separate, essentially procedural rule. *Id.* at 535-36. It then held that the federal interest in allocating the functions of the judge and jury in federal court outweighed the state's

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[9] *See* C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4504, at 29.

interest in avoiding the somewhat speculative possibility of differential outcomes caused by application of the federal rule. *Id.* at 536-40.

Under this approach, the present issue—*i.e.*, whether plaintiffs may settle with some defendants without waiving claims against others—should be governed by federal law in federal court. First, it cannot be said that the state rule here is "bound up" with the tort claim filed against respondents. After all, the availability *vel non* of partial settlements in no way affects the standards under which respondents may be held liable or the amount of compensation that could be awarded to petitioner. The only real impact of a state rule barring partial settlements is to interfere with the early resolution of claims against some but not all defendants. Such an outcome can hardly be viewed as an "integral" feature of the state tort system. This is particularly clear in view of the fact that tortfeasors, when undertaking their tortious conduct, are very unlikely even to consider this issue, let alone be able to anticipate whether they would ultimately prefer the freedom to settle individually over a rule mandating a united front among all defendants.

It follows that the choice of law here should depend on a balancing of federal interests against any state interest in uniformity between state and federal proceedings. *Byrd*, *supra*. The federal interest here is clear. This Court has "expressly repudiated" the old common-law rule that a settlement with one tort defendant will release all others. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 344 (1971); *see Aro Manufacturing Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 501 (1964). It has done so in large part because the common-law rule interferes with the resolution of matters pending in federal court. *See Zenith Radio*, *supra*, 401 U.S. at 347 ("To adopt the ancient common-law rule

would frustrate . . . partial settlements, and thereby promote litigation . . . ."[10]

This interest, of course, is no less applicable when the case is in federal court under diversity jurisdiction rather than under some other jurisdictional provision. To the contrary, the experience of the Eastern District of Virginia with asbestos litigation illustrates the burdens that may be imposed on the federal courts when they are deluged with diversity actions and may be barred by antiquated state-law rules from lessening the load by encouraging settlements with those defendants willing to offer partial compensation. At stake, ultimately, is the court's ability to manage its own docket.

On the state side of the ledger, by contrast, very little is at stake here. First, it is unlikely that if the federal court were to apply the federal rule on partial settlements, the outcomes of the cases would be markedly different. *Cf. Byrd, supra*, 356 U.S. at 536-37. As we have already suggested, the choice of law here affects primarily the *pace* of the litigation: it determines whether some defendants may offer partial compensation or must await either a global settlement or a trial. The *outcome—i.e.*, the ultimate recovery of the plaintiff from each defendant—may not change at all.

Moreover, the State's interest in this case must be considered in light of the fact that the Virginia legislature attempted to abrogate, in this category of cases, the very

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[10] *See also McKenna v. Austin*, 134 F.2d 659, 662 (D.C. Cir. 1943) ("Compromise is stifled, first, by inviting all to wait for the others to settle and, second, because claimants cannot accept less than full indemnity from one when doing that discharges all.") An additional concern is basis fairness. Under the common-law rule, "[w]rongdoers who do not make or share in making reparation are discharged, while one willing to right the wrong and no more guilty bears the whole loss." *Ibid.* Thus, the "rule short-changes the claimant or overcharges the person who settles . . . ." *Ibid. See also Prosser and Keeton on the Law of Torts* 333 (5th ed. 1984).

common-law rule that was here applied. That legislative judgment was overruled by the Virginia Supreme Court based on a concern that retroactive application of the new rule would improperly take away a right of contribution that defendants had from the time that the tort took place. *Dillon, supra.* But such a fairness concern, whatever its merits as a general matter, is peculiarly inapplicable to diversity cases like this one and the other asbestos cases in Virginia. In these cases, the defendants are all out-of-state manufacturers who could not in principle have based their conduct on an expectation of a right to contribution that was not subject to abridgement through a partial settlement.[11] Thus, the State can hardly claim a substantial interest in protecting these defendants from the impact of the retroactive legislative change. In sum, under *Byrd*, this is clearly a matter where the balance favors application of federal law.

B. The Hanna v. Plumer Approach

Although the balancing test set out in *Hanna v. Plumer, supra,* is somewhat different, the outcome remains the same under that approach. There, the Court stated that the determinative question is whether application of a particular federal rule in diversity cases would create differences between state and federal litigation of the same types of claims that are sufficiently significant to cause "forum shopping" or "inequitable administration of the laws." 380 U.S. at 468.[12] The Court held that, under these standards, service of process under federal procedures should have been allowed in a diversity

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[11] A partial settlement, using either a covenant not to sue or a release, is now possible in the large majority of American jurisdictions. *See Prosser and Keeton on the Law of Torts* 333-34 (5th ed. 1984).

[12] *See* 19 C. Wright, A. Miller & E. Cooper, *supra,* § 4504, at 38-39.

case.[13] It reasoned that allowing use of a federal service, method, although highly "outcome-determinative" in that case after the fact, would only require a minor divergence between the procedures in federal and state cases in the future. This divergence would neither affect the choice of a forum nor create issues of inequitable treatment of parties proceeding on the same types of claims in federal and state courts. *Id.* at 468-69.

Here, precisely the same analysis applies. No party is likely even to consider the issue of partial settlements in selecting a federal or state tribunal. Moreover, while a divergence between state and federal rules may mean that multi-defendant cases proceed along somewhat different paths, these differences again involve the pace of the litigation and thus are not of the character that would raise concerns of inequitable administration of the law. Finally, since the common-law rule applies in Virginia only to torts that were completed before 1979, and is used in few if any other states, the consequences of selecting federal law here would for that reason alone be insignificant. Future plaintiffs in most cases will know that the rules are essentially the same in the state and federal forums.

II. Especially in View of the Practical Problems Now Facing the District Court in a Multitude of Pending Cases, This Case Should at Minimum Be Held Pending the Decisions in Two Other Cases Argued this Term.

Even if the Court should conclude that the error below is not sufficiently important to warrant plenary review, it would still seem appropriate to hold this petition pend-

[13] The Court went on to rely on the fact that requiring service under state procedures would conflict with valid provisions of the Federal Rules of Civil Procedure. 380 U.S. at 469-74. The factors discussed here, however, were set out before the Court reached this additional issue.

ing the rulings in two other *Erie* cases already argued this Term. In *Stewart Organization, Inc. v. Ricoh Corp.*, No. 86-1908, and *Budinich v. Becton Dickinson and Co.*, No. 87-283, this Court may well provide further guidance to the federal courts concerning the proper way to resolve *Erie* issues. If so, holding this petition and later remanding this case to the Fourth Circuit would allow that court to reconsider its ruling in light of the revised or clarified *Erie* standards.

Any doubt about the need for holding this petition should, we submit, be resolved in favor of that course of action in light of the immense practical difficulties created by the Fourth Circuit's ruling. As the district court itself recognized in its order applying federal law here, a sudden and unforeseen application of the old common-law rule on partial settlements in a multitude of pending asbestos cases will force the court to take one of two undesirable actions. It will either have to dismiss the claims of plaintiffs who had no reason to doubt the availability of partial settlements signed prior to 1985, or it will have to allow rescission of those settlements. The latter option, of course, will mean that the parties will now be litigating hundreds of claims against particular defendants that were thought to have been resolved years ago. If there is a possibility that these problems could be avoided after the Court clarifies the *Erie* standards, that potential resolution should not be lightly rejected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1864

FRANCIS MARION CAVE,
Appellee,

versus

JOHNS-MANVILLE CORP., *et al.*,
Defendants,

and

PITTSBURGH CORNING CORPORATION;
UNITED STATES GYPSUM COMPANY;
NATIONAL GYPSUM COMPANY,
Appellants.

No. 85-1865

CHARLES WESLEY MANN, ADMINISTRATOR OF THE ESTATE OF ELIZABETH FRANCES MANN, DECEASED,
Appellee,

versus

UNITED STATES OF AMERICA,
Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk
John A. MacKenzie, Senior District Judge—
(C/A 77-738 and 85-235)

Argued: June 4, 1986 Decided: February 19, 1988

Before HALL, MURNAGHAN, and SPROUSE, Circuit Judges.

Archibald Wallace III (William N. Watkins; Sands, Anderson, Marks & Miller on brief) for Appellants Pittsburgh Corning Corporation, Inc., et al.; Roger K. Davis, United States Department of Justice (Richard K. Willard, Assistant Attorney General; Justin W. Williams, Acting United States Attorney; Harold J. Engel, Deputy Director, Torts Branch, Civil Division; Joseph B. Cox, Jr., Assistant Director on brief) for Appellant United States of America; Joel I. Klein (Richard G. Taranto; Onek, Klein & Farr; Robert R. Hatten; Donald N. Patten; Patten, Wornom & Watkins; Richard S. Glasser; Glasser & Glasser on brief) for Appellees.

PER CURIAM:

These interlocutory appeals were brought pursuant to 28 U.S.C. § 1292(b)[1] and have been consolidated for re-

[1] 28 U.S.C. § 1292(b) provides that:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

See also Fed. R. App. P. 5.

view. In No. 85-1865, the United States appeals from the district court's order denying its motion to dismiss or, in the alternative, for summary judgment in Charles Wesley Mann's negligence action brought against the government under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b) and 2671. In No. 85-1864, Pittsburgh Corning Corporation, United States Gypsum Company, and National Gypsum Company (the "Companies") also appeal from the same district court order, which denied their motion to dismiss or, in the alternative, for summary judgment in Francis M. Cave's diversity action alleging negligence and breach of implied warranties of safety. These cases were held in abeyance pending this Court's en banc decision in *Auer v. Kawasaki*, 830 F.2d 535 (4th Cir. 1987). After considering these cases in light of *Auer*, we now affirm in part; reverse in part; and remand.

I.

Both actions involve claims by plaintiffs concerning damages arising out of exposure to asbestos. In his action, Mann, as administrator of the estate of his deceased wife, alleges that his wife died of mesothelioma caused by her exposure to asbestos dust brought home by him from the Norfolk Naval Shipyard during the course of his employment there from 1946 until 1973. Plaintiff asserts that the United States is liable in negligence for that exposure. Before filing the instant action, Mann had filed a diversity action against thirteen manufacturers of asbestos-containing products, contending that his wife's death was due to exposure to asbestos dust which he brought home with him from the Norfolk Naval Shipyard and which had resulted from the use of defendants' products (*Mann I*). Plaintiff alleged negligent design and manufacture of the asbestos-containing products, breach of implied warranties, and fraud. The United States was impleaded into that action, based upon FTCA.

Mann entered into settlement agreements with four of the defendants in *Mann I*, and they were dismissed from that action. He then filed the present action against the United States (*Mann II*). The government filed a motion for dismissal of the complaint in *Mann II*, or, in the alternative, for summary judgment upon the ground that Mann's settlement with four defendants in *Mann I* effected the release of non-settling alleged joint tortfeasors, including the United States. Raymark Industries, Inc., another defendant in *Mann I*, filed a similar motion in that case.

In his action, Cave claims that he developed asbestosis as a result of exposure to asbestos insulation products manufactured by one or more of the Companies during his twenty-year employment in the construction industry. During the pendency of his action, Cave entered into settlement agreements with two defendants named in his complaint, Owens-Corning Fiberglas Corporation and the Celotex Corporation, and the district court entered orders dismissing those defendants. Subsequently, National Gypsum Company filed a motion, which was joined in by Pittsburgh Corning Corporation and United States Gypsum, to dismiss or, in the alternative, for summary judgment, on the ground that Cave's settlements with the other two companies operated as a release of all of the remaining defendants.

The district court considered the motions of the government, Raymark Industries, Inc., and the Companies together. Relying upon *Gamewell Mfg., Inc. v. HVAC Supply, Inc.*, 715 F.2d 112 (4th Cir. 1983), the court ruled that federal common law, and not state law, governs the effect that settlement with one tortfeasor has on other joint tortfeasors in all federal cases, including actions brought pursuant to FTCA or in diversity. The district court denied the motions, concluding that the appropriate federal rule is that a party's release of one joint tortfeasor releases only those parties whom he ex-

pressly intended to release. The court further held, assuming federal common law did not govern the issue, that, as to the *Mann* cases, *Va. Code* § 8.01-35.1 (1984),[2] rather than Virginia common law, would determine the outcome. Nevertheless, the district court concluded that there were controlling questions of law as to which there are substantial grounds for dispute, and it certified its ruling for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The United States and the Companies appealed, and this Court agreed to hear these interlocutory appeals. No appeal was filed by Raymark Industries, Inc. For the reasons that follow, we affirm the judgment in *Mann II* and reverse the decision with respect to *Cave*.

II.

Appellants contend that the district court erred in holding that federal, and not state law, governs the effect of plaintiffs' settlements on the release of non-settling, joint tortfeasors, arguing, *inter alia*, that *Gamewell* does not control here. We are constrained by this Court's decision in *Auer v. Kawasaki*, *supra*, and agree.

In *Gamewell*, the issue before this Court was "whether state law should be adopted as the federal rule of decision to govern the enforceability of settlement agreements." 715 F.2d at 113-14. In that case, we held that:

> Settlements and releases assertedly entered into in respect of federal litigation already in progress implicate federal procedural interests distinct from underlying substantive interests of the parties. Once a claim—whatever its jurisdictional basis—is initiated in the federal courts, we believe that the standards by which that litigation may be settled, and hence resolved short of adjudication on the

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[2] Section 8.01-35.1 provides that a release or covenant not to sue does not discharge any other joint tortfeasor unless its terms so provide.

> merits, are preeminently a matter for resolution by federal common law principles, independently derived.

Id. at 115 (footnote omitted) (citation omitted).

Our subsequent decision in *Auer* makes clear that "[t]he focus must change dramatically, however, when the question is the effect of a release upon the rights and duties of third parties. When those substantive rights and duties are derived from state law, the effect upon them by another party's settlement must be determined under state law." *Id.* at 538 (citations omitted).[3] We therefore conclude that the district court erred in each of these cases in holding that federal common law, and not state law, governs the effect of the releases on nonsettling joint tortfeasors.

III.

A. *Mann v. USA*

The district court correctly found that, in asbestos cases, a claimant's cause of action accrues at the time of injury.[4] The court further concluded that, ". . . it is clear that in no event did decedent's injury occur prior to July 1, 1979, the date the new Virginia law [§ 8.01-35.1] . . . went into effect." It is also evident that Mann's earlier settlement with the four defendants in *Mann I* did not provide for the discharge of liability of any other joint tortfeasor. We conclude, therefore, that the district court's judgment in favor of Mann must be affirmed as governed by *Va. Code* § 8.01-35.1.

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[3] *Gamewell* was a case involving patent infringement, a claim arising solely from federal law. As we noted in *Auer*, "[s]uch a claim is far removed from state law and substantive rights that are creatures of state law." (citations omitted).

[4] Locke v. Johns-Manville Corp., 275 S.E.2d 900 (1981).

B. *Cave v. Pittsburgh Corning Corp., et al.*

Cave filed his complaint on November 30, 1977. There can be no question, therefore, but that Cave's injury occurred prior to the 1979 enactment of 8.01-35.1. Since jurisdiction is based solely on diversity, the Virginia common law rule that the release of one joint tortfeasor releases all joint wrongdoers controls here. The district court's judgment with respect to Cave must accordingly be reversed and remanded to the district court for disposition consistent with this opinion.

AFFIRMED in part;
REVERSED in part;
and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Civil Action No. 83-477-N

CHARLES WESLEY MANN, ADMINISTRATOR OF THE ESTATE OF ELIZABETH FRANCES MANN, DECEASED,
Plaintiff

v.

H. K. PORTER COMPANY, and SOUTHERN TEXTILE CORPORATION, *et al.*
Defendants and Third-Party Plaintiffs

v.

UNITED STATES OF AMERICA,
Third-Party Defendant

Civil Action No. 85-235-N

CHARLES WESLEY MANN, ADMINISTRATOR OF THE ESTATE OF ELIZABETH FRANCES MANN, DECEASED,
Plaintiff

v.

UNITED STATES OF AMERICA,
Defendant

Civil Action No. 77-738-N

FRANCIS MARION CAVE,
Plaintiff

v.

JOHNS-MANVILLE CORP., *et al.*,
Defendants

MEMORANDUM OPINION

Asbestos litigation has never proved easy in the Eastern District of Virginia, both for the parties and the Court. Difficult legal questions compounded by complex factual situations arising largely from the nature of the plaintiffs' latent injuries have troubled this Court and the Fourth Circuit for years. *See e.g. Oman v. Johns-Manville Corp.*, No. 82-1821 (4th Cir. June 6, 1985), *reversing, White v. Johns-Manville Corp.*, 662 F.2d 234 (4th Cir. 1981).

The question before us today is another such example. Resolution of the issue presented affects not only the instant cases, but virtually all pending and future asbestos suits in Virginia.

This matter is before the Court on the motions to dismiss or, in the alternative, for summary judgment of defendants the United States of America, Raymark Industries, National Gypsum, Pittsburgh Corning and United States Gypsum. For purposes of this matter, all of the moving defendants allege that the Virginia Supreme Court's recent holdings in *Shiflet v. Eller*, 228 Va. 115, 319 S.E.2d 750 (1984) and *Potomac Hospital Corp. v. Dillon*, 229 Va. ——, 329 S.E.2d 41 (1985) compel their dismissal in these cases. Because we find *Shiflet* and *Dillon* inapplicable for the reasons stated herein, we DENY all of the defendants' motions to dismiss.

Factual Background

For purposes of these motions, the facts of the instant cases need not be discussed at great length. In the *Mann* cases, plaintiff Charles Wesley Mann brings these actions as administrator of the estate of his deceased wife, Elizabeth Frances Mann. He alleges that his wife contracted and died of mesothelioma caused by her exposure to

asbestos dust brought home by him during his employment at the Norfolk Naval Shipyard from 1948 until 1973. Mann initially filed suit in July, 1983 against thirteen manufacturers of asbestos-containing products, some of whom have impleaded the United States of America in this action (*Mann v. Raymark Industries, et al.*, Civil Action No. 83-477-N). Mann subsequently filed a separate suit against the United States on March 3, 1985, in which he alleged that the United States' negligent failure to prevent decedent's exposure or warn of the risks of exposure caused her death (Civil Action No. 85-235-N).

Since April, 1984 Mann has settled with four of the thirteen manufacturing defendants. These settlements have been structured so that in consideration for the payment of confidential sums of money by each settling defendant, Mann has executed covenants not to sue these defendants. Three settlements were executed in April, 1984, and the last was executed in December, 1984. The settlements were approved by this Court and orders of dismissal without prejudice were entered with respect to each settling defendant.

Jurisdiction in the initial *Mann* case is premised on diversity of citizenship, 28 U.S.C. § 1332(a), and on the Federal Tort Claims Act, 28 U.S.C. § 1346(b); 28 U.S.C. §§ 2671 *et. seq.*, in the action against the United States. The moving defendants are Raymark Industries in 83-477-N and the United States in 85-235-N.

In *Cave* (Civil Action No. 77-738-N) plaintiff Francis Cave seeks to recover for injuries allegedly resulting from his exposure to asbestos products manufactured by various defendants. While there is a dispute as to when Mr. Cave first received a diagnosis of asbestosis, it is clear that at the latest, such diagnosis was confirmed in December, 1977. Plaintiff Cave is here solely on the basis of diversity jurisdiction, 28 U.S.C. § 1332(a). Cave has

settled with two of the several defendants whom he alleges are jointly and severally negligent. Specifically, in March, 1982 and February, 1984 this Court entered orders dismissing Owens-Corning Fiberglas Corporation and Celotex Corporation, respectively based upon plaintiff's motions and his execution of covenants not to sue. The moving defendants in *Cave* are National Gypsum, Pittsburgh Corning and United States Gypsum.

It is worth noting, that in both the earlier *Mann* case and *Cave*, when orders were entered dismissing certain of the defendants with whom plaintiffs had settled, none of the remaining defendants moved for dismissal or entry of summary judgment. Moreover, all of the executed covenants not to sue specifically noted that they applied only to the instant parties and the defendants' successors in interest, and not to any other defendants. Until *Shiflet* was decided in September, 1984 all parties in these and other asbestos cases relied on the presumed validity of Va. Code § 8.01-35.1, which is discussed herein.

Analysis

We start from the vantage that prior to 1979 Virginia courts followed the common law rule that release of one joint tort-feasor operated as a release of all. *Wright v. Orlowski*, 218 Va. 115, 120, 235 S.E.2d 349, 352 (1977). In July, 1979, however, the Virginia legislature amended the Virginia Code to provide that a covenant not to sue entered with one joint tort-feasor would not discharge other joint tort-feasors, unless the terms of the covenant so provided. Va. Code § 8.01-35.1. The next year, by amendment effective July 1, 1980, releases were expressly included within the statute. The Virginia legislature further amended the statute on April 1, 1982 to provide that covenants not to sue executed on or after July 1, 1979 and releases executed after July 1, 1980 were sub-

ject to the provisions of the statute, regardless of the date that the underlying cause of action accrued. Va. Code § 8.01-35.1(D). (For the current version of the statute see "Appendix A" hereto attached.)

In interpreting the statute the Virginia Supreme Court concluded in *Shiflet v. Eller, supra*, that the 1979 version of Va. Code § 8.01-35.1 altered the substantive inchoate right to contribution of any non-settling defendant. The statute could not therefore be applied retroactively in a personal injury action that accrued in 1977. Such retroactive application would violate the non-settling defendants' due process rights under Va. Code § 8.01-1. *Shiflet*, 228 Va. at 121; 319 S.E.2d at 754.

The Virginia Supreme Court further interpreted Va. Code § 8.01-35.1 in its recent decision in *Potomac Hospital Corp. v. Dillon, supra.* In *Dillon* the Court ruled that the 1982 version of the statute which added subsection (D) was unconstitutional as applied to a medical malpractice case that accrued in 1977. The Court again found that retroactive application of the statute violated the non-settling defendant's substantive right to contribution and therefore violated its due process rights. *Dillon*, 229 Va. at ——, 329 S.E.2d at 44-45.

Defendants now argue that application of *Shiflet* and *Dillon* to the instant cases compels their dismissal. We disagree.

Defendants' argument is premised on the notion that the Virginia law of settlements controls these federal cases. This argument ignores the recent mandate of the Fourth Circuit Court of Appeals in *Gamewell Manufacturing, Inc. v. HVAC Supply, Inc.*, 715 F.2d 112, 115-16 (4th Cir. 1983). Judge Phillips' majority opinion in *Gamewell* was clear that in this Circuit, federal common law and not state law governs the legal effect of settlements in federal cases. That this ruling extended to *all* federal cases and was not limited to *Gamewell* itself or

federal cases premised upon a federal statutory cause of action was manifested by the following language:

> "Settlements and releases assertedly entered into in respect of federal litigation already in progress implicate federal procedural interests distinct from the underlying substantive interests of the parties. Once a claim—*whatever its jurisdictional basis*—is initiated in the federal courts, we believe that the *standards by which that litigation may be settled*, and hence resolved short of adjudication on the merits, *are preeminently a matter for resolution by federal common law principles*, independently derived."

Id. at 115 (emphasis added) (citations omitted).

Judge Phillips conceded, as do we, that there exist decisions at odds with this principle in its application to diversity cases. Judge Phillips stated his belief, however, that the *Erie* doctrine did not command application of state law in the matter of settlements, regardless of whether jurisdiction is invoked on diversity or federal question grounds. *Id.* at 115 n.9 (citations omitted).

The Court finds *Gamewell* dispositive of the question of whether federal law governs settlements in federal cases. We recognize that with respect to most aspects of both diversity cases and Federal Tort Claims Act suits, state law controls. *E.g. Richards v. United States*, 369 U.S. 1, 14 (1962) (state conflict of law principles apply in multistate FTCA actions); *Glover v. Johns-Manville Corp.* 525 F.Supp. 894, 899 (E.D.Va. 1979) (indemnity question in FTCA suit governed by State law); *aff'd in part, vacated in part and remanded*, 662 F.2d 225 (4th Cir. 1981). The Fourth Circuit, however, has issued a clear directive that federal common law controls the matter of settlements in federal cases, and we follow the Court's mandate here. Moreover, it is well established that issues relating to the releases of federal statutory

causes of action are matters of federal law. *E.g. Dice v. Akron, Canton & Youngstown Railroad Corp.*, 342 U.S. 359, 361-62 (1952); *Parker v. DeKalb Chrysler Plymouth*, 673 F.2d 1178, 1180 (11th Cir. 1982). We find this principle's extension to diversity cases well reasoned.

We have examined defendants' arguments against applying *Gamewell* and find them unpersuasive. We recognize that *Gamewell* itself is a federal patent case and that the plaintiff there proceeded under a federal statutory cause of action. *Gamewell*, 715 F.2d at 114. As previously discussed, however, Judge Phillips' broadly worded opinion specified that this distinction is immaterial; *Gamewell* is based on the idea that once a claim is in federal court—whatever its jurisdictional basis—the standards of its settlement are a matter for resolution by federal common law principles. *Id.* at 115. *See also Bergstrom v. Sears, Roebuck and Co.*, 532 F.Supp. 923, 931 (D.Minn. 1982) (federal courts competent to apply their own law in deciding whether lawsuit settled); *Stratton Group, Ltd. v. Sprayregen*, 466 F.Supp. 1180, 1186 n.7 (S.D.N.Y. 1979) (contribution in federal action governed by federal law).

We further recognize that the settlement issue before the *Gamewell* panel is not the same as the issue here. In *Gamewell* the Court decided on the parties' respective rights to enforcement or recission of a settlement agreement which was entered into on the basis of mistake of fact. *Gamewell*, 715 F.2d at 113-14. Judge Phillips recognized the distinction between that issue and "the separate question of the proper rule of decision governing the effect of that agreement upon persons not parties to the agreement." *Id.* at 114 n.4. Judge Phillips' very next sentence, however, indicated the before-mentioned rule that federal law is "applied to determine whether the release of a federal cause of action releases joint wrongdoers or co-conspirators not parties to the agreement." *Id.* (citations omitted). In keeping with this rule and the

spirit of Judge Phillips' opinion, we accordingly find *Gamewell* applicable to *all* questions of settlement in *all* federal cases.

We disagree with defendants' contention that the *Erie* doctrine requires we apply Virginia law in this matter because it involves the defendants' right of contribution, which right the Virginia Supreme Court has held to be substantive and vested. *See Dillon, supra*, 329 S.E.2d at 44-45; *Shiflet, supra*, 228 Va. at 121, 319 S.E.2d at 754. While the right to contribution may be substantive, the matter of settlements in federal cases, even diversity cases, is one of federal procedure and *Gamewell* mandates that federal common law be applied.

Finally, we recognize that in earlier cases federal courts have applied Virginia law in deciding the effects of a settlement with some but not all of the joint tort-feasors. *E.g. Perdue v. Sears, Roebuck and Co.*, 694 F.2d 66 (4th Cir. 1982); *Carickhoff v. Badger-Northland, Inc.*, 562 F. Supp. 160 (W.D. Va. 1983). Both of these cases predate *Gamewell* however, and in neither was the question before us now actually presented. Moreover, it was the same district judge who heard both cases originally, and in *Perdue* the settlement plaintiff made with one of the defendants was in a state court suit. *Perdue*, 694 F.2d at 67.

Having decided that federal law controls the question of what effect a settlement with one defendant has as to the other joint tort-feasor, we now seek the appropriate federal rule. As previously discussed, it is well settled that with respect to federal cases premised upon a federal statutory cause of action, the federal common law does not follow the original common law principle that release of one defendant releases all. *E.g. Zenith Radio Corp. v. Hazeltime Research*, 401 U.S. 321, 342-47 (1970) (in federal antitrust cases, Court embraced straightforward rule that party releases only parties he intends to

release); *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 501-02 (1964) (same rule, patent claim); *Locafrance U.S. Corp. v. Intermodal Systems Leasing, Inc.*, 558 F.2d 1113, 1115 (2d Cir. 1977) (same rule, federal securities law claims); *Wiederhold v. Elgin, Joliet and Eastern Railway Co.*, 368 F. Supp. 1054, 1059 (same rule, FELA actions). After analyzing the relevant cases and in light of Judge Phillips' language in *Gamewell*, we see no reason why this rule should not likewise apply in diversity cases and Federal Tort Claims Act suits. Our decision is neither surprising nor inequitable, and is in keeping with the principle that an out-dated state law anachronism should not interfere with federal law principles. Moreover, our decision is supported by the similar result reached by then Circuit Judge Rutledge in an automobile accident diversity case. *McKenna v. Austin*, 77 U.S. App. D.C. 228, 134 F.2d 659, 664-65 (D.C. Cir. 1943). In *McKenna*, after reviewing the law on release of joint tort-feasors, Judge Rutledge stated, "there is no support for the rule of unitary discharge in the notion of entirety of obligation among joint tort-feasors. . . . Partial satisfaction taken in compromise and release of liability of one or some of the wrongdoers does not discharge the others." *Id.* at 664-65. We find find Judge Rutledge's opinion persuasive in this matter.

To summarize, we find that *Gamewell* dictates that we apply federal common law to the question before us. We further find that the federal common law governing the matter of partial settlements with joint tort-feasors is that release of one defendant does not release all. Our findings follow the spirit and intentions of the cases we have relied on, as well as the trend of federal law.

Although our ruling with respect to federal law governing settlements effectively resolves this matter, we feel it necessary to discuss one more point. For even assuming that federal common law does not govern this issue, we find the holdings of *Shiflet* and *Dillon* inapplicable

to the instant case of *Mann* and all other cases where a claimant's injury accrued after 1979. In this respect, we agree with counsel for Mann that regardless of the date of decedent's exposure, both her cause of action and the defendants' right of contribution accrued at the time of decedent's injury. *See Locke v. Johns-Manville Corp.*, 221 Va. 951, 957-59, 275 S.E.2d 900, 904-95 (1981). We reject defendants' contention that their right of contribution can exist prior to the date of the plaintiff's injury.

It is well established that a defendant's right to contribution is derivative from the plaintiff's cause of action; the defendants cannot have a right of contribution among themselves until the plaintiff has a valid cause of action. *Horton v. United States*, 622 F.2d 80, 83 (4th Cir. 1980); *Hill v. United States*, 453 F.2d 839, 842 (6th Cir. 1972). In *Locke*, *supra*, the Virginia Supreme Court established that under Virginia law a plaintiff has a valid cause of action in an asbestos case from the time of his or her injury. *Id.* at 959; 275 S.E.2d at 905. It is at that time that defendants acquire their inchoate right to contribution. We dismiss defendants' argument that their right to contribution arises in this case from "the time of the negligent acts," which they construe as the date of the manufacture of the asbestos-containing products or the date of plaintiff's exposure.

Normally, a defendant's right to contribution exists from the time of the negligent acts, as was the Virginia Supreme Court's wording in *Shiflet*, 223 Va. at 121, 319 S.E.2d at 754. It is clear, however, that in cases where the plaintiff's injury and the time of the negligent act are not commensurate, as in products liability cases or latent injury cases, the defendant's right to contribution arises at the time of plaintiff's injury. *Carickhoff v. Budger-Northland, Inc.*, 562 F.2d 160, 164 (W.D. Va. 1983); *Dillon*, 229 Va. at —— n.——, 329 S.E.2d at 44 (defendant's cause of action for contribution arose at time of tort); *Nationwide Insurance Co. v. Minnifield*,

213 Va. 797, 799-800, 196 S.E.2d 75, 77 (1973). Judge Michael's opinion in *Carickhoff*, *supra*, specifically stated that the defendant's right to contribution arose at the time plaintiff was injured by the defective liquid manure pump, and not at the date of the pump's manufacture. *Carickhoff*, 562 F. Supp. at 164-65.

Our holding is equally applicable to Mann's suit against the United States under the Federal Tort Claims Act (Civil Action No. 83-235-N). Federal law determines the date on which plaintiff's FTCA action accrued, *Portis v. United States*, 483 F.2d 670, 672 n.4 (4th Cir. 1972), and under the FTCA this date is defined as the time an injury and its cause are known. *Kubrick v. United States*, 444 U.S. 111, 122-125 (1979). In the *Mann* cases the date of decedent's injury will be a factual question for the jury to decide, *Locke*, 221 Va. at 959, 275 S.E.2d at 905, but it is clear that in no event did decedent's injury occur prior to July 1, 1979, the date the new Virginia law on settlements among joint tort-feasors went into effect. We therefore find *Shiflet* and *Dillon* inapplicable to the *Mann* cases, and all other cases where the injuries, and hence the defendants' right to contribution, arose after July 1, 1979.[1]

Our holding with respect to accrual of plaintiff's cause of action and the defendants' right to contribution is not only mandated by case law but common sense. To adopt the defendants' position would mean that this Court would apply the accrual date for latent injuries to a plaintiff's cause of action (i.e.—the time of the injury), but would apply the accrual date for a single or traumatic injury to defendants' derivative right of action for contribution (i.e.—the time of the negligent act).

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[1] We recognize the same is not true in *Cave* (Civil Action No. 77-738-N), as it is clear that at the latest, plaintiff knew of his injury in December, 1977.

Moreover, the practical effect of adopting defendants' argument would be disastrous, not only for plaintiffs, but for this Court. In addition to the obvious inequity of requiring dismissal of all current cases in which a plaintiff had settled with at least one defendant despite such result being exactly contrary to all parties' intentions, a holding such as the defendants suggest would make settlements in future asbestos cases impossible. Carried through, defendants' argument means that as their right to contribution arose at the time of the manufacture of asbestos-containing products or at the time of a plaintiff's exposure, both of which are well before 1979, a plaintiff could not therefore settle with *any* defendant because the other defendants' substantive rights to contribution would require their dismissal. This holding would result in a tremendous waste of resources and time for plaintiffs, defendants and this Court, as all cases would have to be tried to completion. Even that is now impossible, for Johns-Manville and Unarco are in bankruptcy, and all cases involving those companies are stayed.

We do not believe that defendants' theory is directed by *Shiflet* and *Dillon*, nor do we believe that such outcome was ever intended by the Virginia Supreme Court. *Shiflet* and *Dillon* both involve single, traumatic injuries, not the latent type injury that is present in asbestos cases. There are currently over 400 asbestos suits pending in this division of the Eastern District of Virginia involving 6000 defendants. In over 70% of these cases some partial settlement has been reached. Such settlements have been specifically encouraged by this Court and have proved beneficial to both plaintiffs and defendants. These settlements were approved by this Court and met the expectations of all parties. Included in these expectations was the idea that Va. Code § 8.01-35.1 governed and that release of one defendant did not release others, unless the settlement so provided.

Conclusion

At this point in time we are loathe to change both the parties' expectations and the results previously reached. We decline defendants' invitation to open the Pandora's Box which their arguments mask. We find federal law controlling on the issue of partial settlements in asbestos cases and we further find *Shiflet* and *Dillon* inapplicable to cases where a plaintiff's injury occurred after July 1, 1979. To find otherwise would not only be in direct contravention of the law, but would bring disaster upon the parties and this Court.

In light of the importance of this jurisdiction question, the importance of this action, the fact that this Opinion involves controlling questions of law as to which there is substantial grounds for difference of opinion and that an immediate appeal from this Opinion may materially advance the ultimate termination of this litigation, the right of any interested party to apply for an interlocutory appeal is recognized and granted.

An Order will be entered, contemporaneously with this Memorandum Opinion, denying all of the defendants' motions to dismiss or, in the alternative, for summary judgment.

/s/ John [Illegible]
United States District Judge

Norfolk, Virginia

July 8th, 1985.

"APPENDIX A"

The current statute provides:

§ 8.01-35.1. Effect of release or covenant not to sue in respect to liability and contribution. —A. When a release or a covenant not to sue is given in good faith to one of two or more persons liable in tort for the same injury, or the same property damage or the same wrongful death:

1. It shall not discharge any of the other tort-feasors from liability for the injury, property damage or wrongful death unless its terms so provide; but any amount recovered against the other tort-feasors or any one of them shall be reduced by any amount stipulated by the covenant or the release, or in the amount of the consideration paid for it, whichever is the greater. A release or covenant not to sue given pursuant to this section shall not be admitted into evidence in the trial of the matter but shall be considered by the court in determining the amount for which judgment shall be entered; and

2. It shall discharge the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.

B. A tort-feasor who enters into a release or covenant not to sue with a claimant is not entitled to recover by way of contribution from another tort-feasor whose liability for the injury, property damage or wrongful death is not extinguished by the release or covenant not to sue, nor in respect to any amount paid by the tort-feasor which is in excess of what was reasonable.

C. A release or covenant not to sue given pursuant to this section shall be subject to the provisions of §§ 8.01-55 and 8.01-424.

D. This section shall apply to all such covenants not to sue executed on or after July 1, 1979, and to all releases executed on or after July 1, 1980, regardless of the date the causes of action affected thereby accrued. (1979, c. 697; 1980, c. 411; 1982, c. 196; 1983, c. 181.)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

Civil Action No. 83-477-N

CHARLES WESLEY MANN, ADMINISTRATOR OF THE ESTATE OF ELIZABETH FRANCES MANN, DECEASED,
Plaintiff

v.

H. K. PORTER COMPANY, and
SOUTHERN TEXTILE CORPORATION, *et al.*,
Defendants and
Third-Party Plaintiffs

v.

UNITED STATES OF AMERICA,
Third-Party Defendant

Civil Action No. 85-235-N

CHARLES WESLEY MANN, ADMINISTRATOR OF THE ESTATE OF ELIZABETH FRANCES MANN, DECEASED,
Plaintiff

v.

UNITED STATES OF AMERICA,
Defendant

Civil Action No. 77-738-N

FRANCIS MARION CAVE,
Plaintiff

v.

JOHNS-MANVILLE CORP., *et al.*,
Defendants

ORDER

In accordance with a Memorandum Opinion filed by the Court contemporaneously herewith, we hereby DENY the defendants' (the United States of America, Raymark Industries, National Gypsum, Pittsburgh Corning and United States Gypsum) motions to dismiss or, in the alternative, for summary judgment.

It is so ORDERED.

/s/ John [Illegible]
United States District Judge

Norfolk, Virginia

July 8th, 1985.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1591(L)

WILLIAM DOUGLAS AUER,
Appellant,

versus

KAWASAKI MOTORS CORP., U.S.A.,
Appellee,

and

KAWASAKI HEAVY INDUSTRIES, LTD., A Body Corporate of Kobe, Japan,
Defendant.

No. 85-2331

EVAN EBAUGH,
Appellant,

versus

CESSNA AIRCRAFT COMPANY,
Appellee.

No. 85-1864(L)
No. 85-1865

FRANCIS MARION CAVE,
Appellee,

versus

JOHNS-MANVILLE, CORP., *et al*,
Defendants,

and

PITTSBURGH CORNING CORPORATION, *et al*,
Appellants.

[Filed Oct. 17, 1986]

For reasons appearing to the Court,

IT IS ORDERED that *Auer v. Kawaski*, No. 85-1591, and *Ebaugh v. Cessna*, No. 85-2331, are consolidated for the purpose of reargument before the in banc court. Reargument in banc is tentatively scheduled for the December term of Court.

IT IS FURTHER ORDERED that *Cave v. Johns-Manville*, No. 85-1864 and *Mann v. United States*, No. 85-1865, are hereby held in abeyance pending the outcome of the reargument in banc of *Auer v. Kawasaki* and *Ebaugh v. Cessna*.

Chief Judge Winter, Judge Russell, Judge Widener, Judge Hall, Judge Phillips, Judge Sprouse, Judge Ervin, Judge Chapman, udge Wilkinson and Judge Wilkins voted in favor of rehearing in banc. There were no votes against rehearing in banc.

Entered at the direction of Judge Hall.

For the Court,

/s/ JOHN M. GREACEN
Clerk

SUPREME COURT, U.S.
FILED
JUN 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1871

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

FRANCIS MARION CAVE,
Petitioner,

v.

PITTSBURGH CORNING CORPORATION,
UNITED STATES GYPSUM COMPANY,
and NATIONAL GYPSUM COMPANY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PITTSBURGH CORNING CORPORATION;
UNITED STATES GYPSUM COMPANY,
NATIONAL GYPSUM COMPANY;

Respondents.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties to the proceedings in the Fourth Circuit Court of Appeals whose judgment is sought to be reviewed by this Court.

Pittsburgh Corning Corporation, a party to this appeal, is not a subsidiary or affiliate of any publicly owned corporation.

United States Gypsum Company, a party to this appeal, is not a subsidiary or affiliate of any publicly owned corporation.

National Gypsum Company, a party to this appeal, is not a subsidiary or affiliate of any publicly owned corporation.

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IN THE

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PITTSBURGH CORNING CORPORATION;
UNITED STATES GYPSUM COMPANY,
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Respondents.

BRIEF IN OPPOSITION OF RESPONDENTS PITTSBURGH CORNING CORPORATION, UNITED STATES GYPSUM COMPANY, and NATIONAL GYPSUM COMPANY

The Respondents, Pittsburgh Corning Corporation, United States Gypsum Company and National Gypsum Company oppose certiorari in this case. The reasons asserted by the Petitioner are insufficient to warrant review of the Fourth Circuit's decision, since they are premised upon an incomplete comparison of the federal and state interests involved and upon the claimed importance of the cause to the Petitioner.

In *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938), *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958) and *Hanna v. Plumer*, 380 U.S. 460 (1965), this Court has established guidelines to be followed in deciding whether federal or state law will control in certain conflicts situations. While the word tests of these cases artfully suggest resolution

points under language such as "bound up", "outcome determinative", and "procedural versus substantive", the underlying truth in each case is that while federal and state systems of justice are independent, they at times meet on overlapping grounds. In these confrontations, Rules of conflicts of laws determinations have evolved which must not be taken as text oriented but must be grounded in the underlying policies of the *Erie* rule.

The Fourth Circuit considered the underlying policies established by *Erie*, *Byrd* and *Plumer* involved in this case in deciding *Auer v. Kawasaki Motors Corp. U.S.A.* and *Ebaugh v. Cessna Aircraft Co.*, 830 F.2d 535 (4th Cir. 1987), *cert. denied, sub nom. Ebaugh v. Cessna Aircraft Co.*, 108 S.Ct. 1076 (1988). There, the Fourth Circuit noted that, when in a diversity only case, the question of the effect of a release upon the rights and duties of third parties is in issue, state law and not federal common law must be followed, since rights and duties of third parties to the actionable events derived from the same state law.

The Commonwealth of Virginia has spoken precisely on the issue of *Cave* in *Potomac Hosp. Corp. v. Dillon*, 229 Va. 355, 329 S.E.2d 41, *cert. denied*, 106 S.Ct. 352 (1985) and in *Shiflet v. Eller*, 228 Va. 115, 319 S.E.2d 750 (1984). Both cases establish that covenants not to sue under Virginia Code Section 8.01-35.1 (Cum. Supp. 1987) cannot be utilized with causes of action accruing before the effective date of the statute. Virginia observed that retroactive application would nullify a co-defendant's vested substantive right to contribution without due process of law.[1]

In *Cave*, the Fourth Circuit followed the underlying Rules of *Erie*, *Byrd* and *Plumer*, in determining the management of a district court's docket and resolution of its cases, as urged by Cave, did not outweigh the loss of the substantive right of contribution, the obvious difference in treatment of defendants depending upon the forum in which they might be placed, and the potential for different outcomes for the same issue in state

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[1] Under Virginia law, a cause of action in a case like Cave's accrues when the plaintiff had a diagnosable and recognizable disease and not with each tortious event. *See Locke v. Johns-Manville Corp.*, 221 Va. 951, 275 S.E.2d 900 (1981).

and federal courts.[2]

Of similar importance is the rule consistently followed by this court that:

> [C]ertiorari should be sparingly exercised, and only when the circumstances of the case satisfy the court that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of the nation in its internal and external relations, demands such exercise.

Fields v. United States, 205 U.S. 292, 295 (1907).

The Fourth Circuit's decision does not conflict with any other federal circuit on the issues raised by *Cave*. In fact, the sixth and third circuits apparently agree with the Fourth Circuit's conclusion in *Cave*. *See Carolina Casualty Ins. Co. v. Insurance Co. of North America*, 595 F.2d 128, 139-40 (3rd Cir. 1979); *Hageman v. Signal L. P. Gas, Inc.*, 486 F.2d 479 (6th Cir. 1973); *see also Lee v. Hunt*, 631 F.2d 1171 (5th Cir. 1980), *cert. denied, sub nom. Hunt v. Hunt*, 454 U.S. 834 (1981), *reh. denied*, 454 U.S. 1129 (1981). Of additional interest, is the observation that this court previously declined to review the identical issue in *Auer*. *See id.*, 830 F.2d 535, *cert. denied, sub nom. Ebaugh v. Cessna Aircraft Co.*, 108 S.Ct. 1076 (1988).

In short, the message of this Court stated in *Magnum Import Co. v. Coty*, 205 U.S. 159, 163 (1923) should control:

> The jurisdition to bring up cases by certiorari from Circuit Courts of Appeals...was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing.

Cave has requested that this Court hold this petition pending the rulings in *Stewart Organization, Inc. v. Ricoh Corp.*, No. 86-1908 (U.S. 1986) and *Budinich v. Becton Dickinson and Co.*, No. 87-283 (U.S. 1987). *Stewart* was argued on February 29, 1988 and this Court has not yet rendered its opinion. *Budinich*

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[2]Only those cases with a cause of action arising before July 1, 1979 are similarly effected, not the hundreds of cases originally filed, since the majority of the older cases are now off the docket.

was decided on May 23, 1988 by this Court. In *Budinich* this Court ruled federal law applies where the resolution of issues is governed by federal statute. The ruling of *Budinich* has no effect on *Cave*, since the *Cave* issue is not governed by federal statute. In any event *Cave* continues to be not of sufficient constitutional importance for this Court to withhold its decision on the Petition now pending.

CONCLUSION

The Petition for Writ of Certiorari should be denied. There is no new or fresh issue of Constitutional moment to be decided in view of *Erie*, *Plumer* and *Byrd*, nor is there conflict among the federal circuits. In essence, the issues are for state determination, and they have been long decided. The Fourth Circuit correctly applied the law as it is and ought to be in determining that Virginia law must be applied to the issues of this case.

Respectfully submitted,

PITTSBURGH CORNING CORPORATION,
UNITED STATES GYPSUM COMPANY and
NATIONAL GYPSUM COMPANY

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